

No. 42994-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a
Washington municipal corporation,

Respondent

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation;
CENTURYTEL OF WASHINGTON, INC., a Washington corporation;
and FALCON COMMUNITY VENTURES I, L.P., a California limited
partnership d/b/a CHARTER COMMUNICATIONS,

Appellants.

REPLY BRIEF OF APPELLANT
CENTURYTEL OF WASHINGTON, INC.

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I. INTRODUCTION

Upon careful review, the Brief of Respondent (“PUD Br.”) proves that the analysis offered by the Public Utility District No. 2 of Pacific County (the “District”) is plainly wrong. The District fails to address numerous infirmities in the lower court’s decisions identified by CenturyTel of Washington, Inc. (“CenturyLink”) in its Opening Brief of Appellant (“Op. Br.”) in this matter. Most incredibly, the District wholly fails to offer any affirmative analysis of its own on the core issue before this Court: the proper interpretation of RCW 54.04.045,¹ especially section 3 of the Statute. For all the reasons identified below, the District’s arguments must be rejected. The Superior Court should be reversed, and CenturyLink granted judgment in its favor. CenturyLink should be awarded its attorneys’ fees below, and in this Court.

II. ARGUMENT

A. Overview: The District’s Briefing Is Improper

Throughout its briefing, the District repeatedly makes several types of mistakes. The District simply should not be excused for its failures to address significant arguments; for its repeated misuse of the record before this Court; and for its consistent refusal to address precedent from other expert bodies that have considered pole attachment issues.

¹ As amended by the Legislature in 2008, also called the “Statute” herein.

1. The District Does Not Address Multiple Arguments At All

Despite its over-length brief, the District makes no response whatsoever to many arguments made by CenturyLink. These include: CenturyLink's overview of pole regulation and its introduction to the structure of the various pole attachment rate models² before the Court, Op. Br. at 4-11; CenturyLink's analysis of the actual text of RCW 54.04.045, as compared with RCW 80.54.040 and 47 U.S.C. § 224, Op. Br. at 17-20; CenturyLink's analysis of the structure, timing and effect of section 4 of RCW 54.04.045, Op. Br. at 33-35; and CenturyLink's argument arising from the undisputed evidence that the pole attachment agreement insisted upon by the District was the most one-sided agreement ever observed by experienced participants in this industry, Op. Br. at 11-12, 38-48. Because of the District's utter failure to respond to these arguments as a matter of law, it has conceded the correctness of CenturyLink's position on these issues. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

2. The District Repeatedly Relies upon Evidence Excluded by the Trial Court, and Those Arguments Should Be Disregarded

CenturyLink notes, and objects to, the repeated instances in which the District has relied upon the testimony or exhibits excluded by the trial

² Because the District does not dispute CenturyLink's explanation, this reply brief will use all terms as defined in its Opening Brief without repetitive redefinition.

court. *See, e.g.*, PUD Br. at 25 (citing Tr. 166:3-167:16; trial court sustained objection to this testimony); *id.* at 37 (reference to *TCI v. Seattle*, excluded by trial judge), CP 2276; *id.* at 1 (reference to size or economic strength of defendants; trial court excluded such evidence). RP 786:19-792:13. Respectfully, such practices are unacceptable. The Court should disregard arguments that rely on such improper support.

3. The District Evades Precedent

Time and again, the District chooses to evade and ignore precedent by contending that it is not subject to regulation by the FCC or the WUTC. *E.g.*, PUD Br. at 24, 32, 33, 34, 42, n.44, 54. Of course, no one argues that the District is subject to regulation by the FCC or, with certain exceptions, by the WUTC – but that is not the point. The FCC has interpreted a similar federal statute and implementing regulations – including the FCC Telecom rate, which the District advocates is the basis for at least one portion of the Statute. The WUTC has interpreted and applied RCW 80.54.040, the basis for another portion of the Statute. *See* Appendix A hereto; Section C(4)(d), below. It is routine for Washington courts to look to other authorities when interpreting statutes similar to those used by other jurisdictions. *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm’n*, 112 Wn.2d 278, 283, 770 P.2d 624 (1989) (“[W]hile federal decisions are not controlling, they are persuasive

authority when construing state acts which are similar to the federal act.”). Indeed, recourse to helpful (while not binding) authority is the essence of the common law, pursuant to which the courts

may consider well-reasoned precedents from federal courts and sister jurisdictions. Although not binding on this court, such precedents may provide persuasive authority.

State v. Chenoweth, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007)

(citation omitted); *see also In re Dependency of M.J.L.*, 124 Wn.App. 36, 40, 96 P.3d 996 (2004) (“Because this is an issue of first impression in Washington, we may look to guidance from cases from other jurisdictions.”). The District may not turn a blind eye to helpful authority from expert agencies that have carefully considered the issues before this Court.

B. The Proper Standard of Review

The District insists that its actions interpreting and applying the Statute, which deliberately constrained its freedom to set rates, should be subject to an arbitrary and capricious standard of review. Respectfully, that is not the law. It is up to this Court to determine the proper interpretation of the law. Particularly in a situation where the Legislature has sought to more closely regulate PUDs – and only PUDs³ – there is no reason for the Court to afford the District’s determinations any deference

³ Compare the Statute, 2008 Laws ch. 197 with 1996 Laws ch. 32 (initial version of RCW 54.04.045, also applicable to all other public power providers).

in the interpretation of that increased regulation. *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 871, 129 P.3d 838 (2006) (court reviews agency’s interpretation of statutes under an error of law standard, which allows an appellate court to make its own interpretation of the statute or regulation).

The District’s reliance on case law according deference to state administrative agencies is wholly misplaced. PUD Br. at 20. As our courts have made clear, deference to statutory interpretations by administrative agencies is appropriate only when “the *particular* agency is charged with the administration and enforcement of the statute.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007) (emphasis added). The District can hardly claim to be the agency charged with administration of the Statute, given that there are 28 PUDs in Washington,⁴ yet the Statute was expressly intended to achieve “greater predictability and consistency in pole attachment rates *statewide*.” Statute, § 1 (emphasis added). The District offers no insight as to how 28 different agencies could be the *particular* agency to which deference is due.

The District acknowledges, PUD Br. at 22 n.13, that the Legislature has restricted the PUDs’ discretion in the area of pole

⁴ Washington Public Utility Districts Association, Frequently Asked Questions, <http://www.wpuda.org/pud-faqs.cfm> (last visited February 15, 2013).

attachment rates since the seminal case on which it relies, *Snohomish County P.U.D. No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 586 P.2d 851 (1978). Given that pole owners have long been recognized to exploit their superior bargaining power to extract “monopoly rents,”⁵ and export their costs to rate payers outside the District, the Court must engage in its own analysis of the law. The District is not entitled to a deferential arbitrary and capricious standard of review.

C. The Proper Analysis of the Rate Provisions of RCW 54.04.045

As CenturyLink explained in its Opening Brief, sections 3(a) and 3(b) (“3(a)” and “3(b)”) of the Statute utilize the same overall model to determine the ultimate rate to be charged to a pole attacher, with one difference. Both subsections establish a range of acceptable rates, from a low end of the incremental costs caused by the pole attachment, to a high end allocating the actual capital and operating costs of the pole owner. The difference between the two subsections arises from how those costs are to be allocated based on the space used by the attacher. *See* Op. Br. at 21-28.⁶ Like the FCC Cable rate, 3(a) attributes both usable and unusable space on the pole in proportion to the space used by the pole attacher. *Id.* at 28-29. Moreover, 3(a) is clearly derived from RCW 80.54.040, which

⁵ *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 330, 122 S. Ct. 782, 151 L. Ed. 2d 794 (2002).

⁶ The District makes no response whatsoever to this analysis. *See* Part II(A)(1), above.

as a matter of undisputed *fact* had been applied, for two decades prior to its incorporation into the Statute, as the FCC Cable rate. *Id.* at 20-23; *see* Section II(C)(4)(d), below. On the other hand, like the FCC Telecom rate, 3(b) allocates the charge to pole attachers based, in part, on the number of entities attaching to the pole. Op. Br. at 32-34.

1. The District Offers No Analysis of Section 3(a)

Incredibly, the District offers not one word of actual analysis of the text of 3(a). Instead, without a single citation to, much less analysis of, the actual statute, the District argues that 3(a) cannot be the FCC Cable formula because 3(a) includes Unusable Space in its calculation, but -- according to the District -- the FCC Cable rate excludes Unusable Space. PUD Br. at 25. Preliminarily, the Court must be struck by the fact that in support of this remarkable assertion, the District relies *solely* on the testimony of various witnesses. *Id.* On its face, this is error. Witnesses may not testify as to the law. ER 701. Of course, testimony by lay or even expert witnesses is no substitute for the interpretation of the actual law by the court. *E.g., Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 229, 344, 858 P.2d 1054 (1993); *United States v. El-Mezain*, 664 F.3d 467, 511-12 (5th Cir. 2011). This Court thus faces the same situation as a federal appellate court: “to the extent [a witness] was expressing a legal opinion he furnished no evidence, only law, and incorrect law at that.”

Bodzin v. City of Dallas, 768 F.2d 722, 726 (5th Cir. 1985).

It is unsurprising that the District did not cite to the actual text of the Statute; when the text is reviewed, it is precisely contrary to the District's claim. The statute underlying the FCC Cable rate, 47 U.S.C. § 224(d)(1), simply could not be more explicit. The rate considers the pole owner's costs "attributable to the entire pole."

Almost equally incredibly, the only other affirmative argument advanced by the District to suggest that 3(a) is not the FCC Cable rate is to invoke section 4 of the Statute. The District's argument is incredible because CenturyLink had anticipated this argument and already demonstrated that it is wrong, Op. Br. at 33-35, *and the District makes no response whatsoever to that argument. See* Section II(A)(1), above.

Section 4 of the Statute does not override the careful statutory analysis as to why 3(a) must be read as the FCC Cable rate, and the District's misleadingly truncated quote of section 4, PUD Br. at 26, illustrates the first reason why: the timing of the enactment of the Statute. Section 4 did not authorize PUDs to substitute the FCC Cable rate for 3(a) as of the time the Legislature considered the Statute in March 2008, but only months later – all while the FCC was actively considering revisions to pole attachment rates. *See* Op. Br. at 7 n.4.

Second, the District offers no response to the fact that its argument is fundamentally irrational. The District would have the Court believe that a PUD would substitute the lower FCC Cable rate for the model offered by the District – the FCC Telecom rate – even though the District would be free to adopt a lower rate under the very text of 3(a).

Finally, the District offers no response whatsoever to the fact that there is one, and only one, noneditorial difference between 3(a) and its source, RCW 80.54.040. Unlike RCW 80.54.040, 3(a) expressly excluded “just compensation” as one of the operating expenses of the pole owner. *See* Appendix A. If a PUD sought on some nondiscriminatory basis to recover a “return” on a public investment, it could utilize the FCC Cable rate. Section 4 need not be given the absurd reading that would result in the manifest difficulties inherent in the District’s proffered interpretation of 3(a). *See* Section II(C)(4), below.

2. The District Offers No Analysis of Section 3(b)

Again, strikingly, the District does not even address the actual language of 3(b) and how it can be read as the APPA formula. The District makes no attempt to explain how a formula expressed in a complicated algebraic model, *see* Op. Br. at Appendix E, can be converted to the straightforward language of 3(b). Instead, the District seizes on the one acknowledged difference between section 3(b) and the FCC Telecom

rate and utilizes that –disregarding all other considerations. PUD Br. at 27-28. Respectfully, this analysis is plain error. As CenturyLink has acknowledged throughout this case, the Legislature believed that it was borrowing from the APPA, as well as the FCC and the WUTC. Ex. 81 at 2. The Legislature modified the FCC Telecom rate by allocating all of the unusable space to all attachers (including the pole owner), as the APPA formula does, rather than two-thirds, as the FCC Telecom rate does. The Legislature did not adopt the APPA’s complicated algebraic formula. The District offers no response. *See* Section II(A)(1), above.

3. The District Turns the Analysis of the Pre-2008 RCW 54.04.045 on Its Head

The District mischaracterizes CenturyLink’s argument as to the invalidity of its rates prior to the enactment of the Statute.⁷ Indeed, the District stands CenturyLink’s argument on its head. Prior to the enactment of the statute, RCW 54.04.045 had required PUD rates to be just, reasonable, nondiscriminatory and sufficient. CenturyLink does not claim that sufficient “actually means ‘no more than sufficient.’” *Cf.* PUD Br. at 38. Rather, CenturyLink argues solely that sufficient means “as

⁷ The District mischaracterizes the record in its footnoted claim that CenturyLink did not challenge the trial court’s findings and conclusions regarding the rates prior to the enactment of the Statute. PUD Br. at 24 n.15. Indeed, the District belies that claim by responding to CenturyLink’s arguments in this portion of its brief -- but it is wrong in any event. *See* Op. Br. at 2 (challenging Finding of Fact 33, the only Finding specifically addressed to pre-Statute rates).

much as is needed; equal to what is specified or required; enough.”

Webster’s New World College Dictionary 1431 (4th ed. 2001). It is the District that argues that a limitation that rates be “sufficient” means something other than the plain term used by the Legislature, and instead allows the District to charge rates that are more than needed, in excess of what is specified or required, or more than enough.⁸

That the PUD’s pre-Statute rates are more than sufficient and thus unlawful is proven by the testimony of the District’s managers. As they testified, when pole attachers seek to attach to one of the District’s poles, it is because the District has already put that pole in service.⁹ RP 201:16-20. Thus, *any* contribution by the pole attacher offsets costs that the District is otherwise solely bearing. RP 450:23-451:4. The excessive rates charged by the District are thus, under the testimony of the District’s own personnel, more than sufficient. CenturyLink has made this argument throughout this litigation, and the District’s suggestion that Defendants did not challenge the pre-statute rates is just wrong.

⁸ The two statutes supposedly supporting the District’s argument, PUD Br. at 38, have entirely no relevance. Indeed, the first of the cited statutes, RCW 54.24.050(4), does not use the term “sufficient” at all, much less define it. The second cited statute, RCW 54.24.080, does not use “sufficient” as a limitation either, except in the context of ensuring the adequacy of rates. Neither statute suggests that sufficient means more than is required.

⁹ This is true by definition because in the rare, RP 451:6-16, instances when the District places a pole at the request of an attacher, or adds to the capacity of an existing pole at the request of an attacher, it charges the attacher the full cost of such work, as recoverable “make ready” fees. RP 451:17-19; 189:24-190:13.

4. The District Provides No Effective Rebuttal to the Manifest Errors in the Interpretation It Offers

The District provides no effective rebuttal to what it dismissively refers to as a “critique” of its baseless interpretation of the Statute -- and in most instances it implicitly admits the validity of CenturyLink’s analysis.

a. The District’s Interpretation Requires the Insertion of Multiple Terms Not Present in the Statute

The District’s insistence that 3(a) is the FCC Telecom rate requires the insertion of the “2/3” figure used by the FCC Telecom rate, a term that the District implicitly acknowledges is not present in 3(a). PUD Br. at 38-39. As anticipated, the District cites the Statute’s reference to a “share” of Unusable Space, PUD Br. at 39, which proves nothing, because a share could be 1/100, or 99/100. Op. Br. at 27-28. The District offers no response.

Similarly, if 3(a) were to be the FCC Telecom rate, it would require consideration of pole height and the number of attaching entities – words that the District again admits are not present in 3(a). PUD Br. at 39 n.39. Indeed, the District’s reference to the demonstrative Exhibit 43A proves the point: the FCC Telecom rate includes the terms pole height and number of attaching entities; 3(a) does not.

b. The District's Interpretation Requires Giving Identical Terms Different Meanings

As CenturyLink pointed out, under the District's construct of 3(a) as the FCC Telecom rate and 3(b) as the APPA formula, the term "actual capital and operating expenses" must mean net costs in 3(a), but gross costs in 3(b). Op. Br. at 30. While the District attempts to distinguish the straightforward language of *Simpson Investment Co. v. Dept. of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000), see PUD Br. at 32, under Washington law it is simply beyond cavil that when the Legislature uses the same terms in a statute, the same meaning is intended.¹⁰ The District makes *no* direct response to this issue, except an in-passing evasion claiming that none of the statutes at issue specify gross or net costs. PUD Br. at 35. Whether any statutory scheme uses gross or net costs throughout is not the issue; the Legislature is presumed to not mean gross costs in one instance, and net costs in an immediately adjacent section, when using the exact same words. The District's interpretation is wrong.

Moreover, the District's interpretation now admittedly suffers from this same infirmity in another regard. The District now admits that the

¹⁰ *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 54, 266 P.3d 211 (2011) ("[W]here similar words are used in different parts of the same statute we presume the words are given the same meaning."); *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997) ("When the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.").

Safety Space is *excluded* from Unusable Space in the FCC Telecom rate but *included* in Unusable Space in the APPA formula. *Id.* at 39. The District acknowledges that the Statute uses the same term in both sections (“required support and clearance space”) to describe Unusable Space; its only response is to refer, *ipse dixit*, to the District’s own, now discredited, arguments as to why 3(b) cannot be the FCC Telecom rate. *Id.* at 39, n.40. Such circular reasoning is no response.

**c. The District’s Treatment of the Safety Space Is
Now Admitted to Be Contrary to Fact**

CenturyLink pointed out that the Safety Space is, under the District’s own demanded contract, *usable*. See Ex. 38 at COM00159. In response to the numerous undisputed instances of the District’s use¹¹ of the

¹¹ The District attempts to respond to CenturyLink’s contention that the trial court’s Finding of Fact 41 is supported by no evidence, PUD Br. at 39, but in doing so again mischaracterizes the record and instead proves CenturyLink’s point. The District cites RP 415:5-9, where the witness describes street lights in the Safety Space as “grandfathered” but does *not* claim such use is being phased out – and immediately admits that the District’s more recently installed fiber communications lines are sometimes in the Safety Space. RP 415:17-23. The District cites RP 1127:17-19, but the witness was there discussing a telephone line, not the district’s use of the Safety Space. RP 1127:6-13. The District cites RP 1133:17-1134:8, but the trial court was explicit—that question and answer was allowed only because it was a hypothetical, not a fact. RP 1134:9-14. The District claims there are so few uses of the Safety Space that it is immaterial, citing RP 311:2-6 – but the witness was referring solely to one form of the District’s use of the Safety Space—street lights. RP 310:23-311:1. Moreover, the witness immediately thereafter admitted that there were other forms of District attachment in the Safety Space that did impact its formula, such as its newer fiber communications attachments. RP 312:8-11. Finally, the most telling proof that the Safety Space is usable by the District is the initial support referenced by the District: it cites RP 304:21-305:20, but there, the witness is again testifying only

Safety Space, *see* Op. Br. at 32, the District's sole response is a complete non-sequitur: the Companies use the Safety Space, too. PUD Br. at 39. That response evades the issue. The District-promoted APPA formula deems the Safety Space to be unusable, when as a matter of (now undisputed) fact it is usable.

d. The District Acknowledges 3(a)'s Basis on RCW 80.54.040

The District no longer disputes that 3(a) is, in all important regards but one, RCW 80.54.040.¹² *See id.* at 33. The District's only response is to again insist that 3(a)'s basis on RCW 80.54.040 is irrelevant because the District is not regulated by the WUTC, and the prior undisputed application of that statute involved private investor-owned companies. *Id.* at 33. Again, that response evades the issue. After reviewing the District's briefing, it is now undisputed that for more than two decades prior to the Statute's enactment the statute that formed the basis for 3(a)

about street lights. RP 304:21-25. However, immediately after the quoted passage the District's General Manager admits: "Q. And that space is available to you to use for that purpose, correct? A. **We could put our stuff in there if we want, yes.**" RP 305:21-23 (emphasis added). Any claim that the Safety Space is not used by the District, and therefore only appropriately included in Unusable Space, is thus not supported by any evidence.

¹² With no citation to the record, the District attempts to rehabilitate the admissions of its expert witness in this regard. PUD Br. at 33 n.33. To the contrary, the record speaks for itself. RP 707:19-713:21. Moreover, the District's attempt to refute its expert's earlier recognition that RCW 80.54.040 had been applied as the FCC Cable rate fails. The point *is* the "historical context;" as a matter of historical fact, prior to the enactment of the Statute, RCW 80.54.040 had been applied as the FCC Cable rate.

had been applied as the FCC Cable Act. Notwithstanding the District's attempts to distinguish the issue away, *id.*, the Legislature should be presumed aware of the WUTC's actions applying the statute the Legislature chose as a model. *See Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) (Congress is presumed to be aware of existing administrative regulations interpreting a prior law when it incorporates it into another law). The District's interpretation is wrong.

D. The Proper Analysis of the Non-Rate Terms of RCW 54.04.045

Preliminarily, the District again relies on the inappropriate arbitrary and capricious standard to evaluate its actions. PUD Br. at 40-41. Again, the District errs. It is for this Court to determine questions of law, under the appropriate interpretation of "just" and "reasonable." *See* Op. Br. at 39-40. The Agreement cannot stand.

1. An Agreement Is Not Fair, Just and Reasonable if It Is Unconscionable

The District disputes that it was under any obligation to negotiate just and reasonable terms, at all. PUD Br. at 42. In doing so, the District all but admits that it insisted on a take-it-or-leave-it adhesion contract. Ex. 38. The District does not deny, because it cannot, that it never even heard out all of the concerns CenturyLink had with its proposed agreement, RP 917:2-7, but just demanded that the Agreement be executed.

Moreover, the District's defense that the Agreement is not

substantively unconscionable depends upon the District's continued insistence that many of the provisions it seeks were in agreements negotiated by CenturyLink and the other co-defendants. *See, e.g.*, PUD Br. at 46. Again, the District does not deny the undisputed evidence that the resulting agreement was the most one-sided any experienced observer had ever seen. Op. Br. at 45-47; RP 1045:11-21. The process of cherry picking isolated provisions from different contracts was rejected by the FCC and approved by the federal courts. *New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (2006). *See* Op. Br. at 47. The District again responds to this persuasive authority with the talismanic response that the District is not subject to the statutes being considered there. PUD Br. at 46. The District fails to address the analysis of real-world contract formation evaluated by an expert agency and ratified by the courts. Allowing parties to point to isolated contractual provisions is contrary to fair bargaining, because parties can obtain benefits without making the corresponding trade-offs. *New Edge*, 461 F.3d at 1109. This is particularly apparent in the process urged by the District, which seeks an after-the-fact opportunity to pick only the one-sided items traded off in good faith negotiations. The District's continued reference to isolated provisions in any party's other pole attachment agreements should be rejected.

**2. An Agreement Is Not Fair, Just and Reasonable if
It Is Contrary to Washington Law**

CenturyLink pointed out two examples where the District's demanded Agreement did not conform to Washington law, on the issues of a one-way attorneys' fee provision, and on the undergrounding of CenturyLink's facilities. On the attorneys' fees issue, the District defends its insistence on terms that it has known all along are contrary to Washington law by asserting that they would not be enforced by Washington courts. PUD Br. at 65-69. The District offers no rationale why a Washington court should in the first instance allow the District to insist on such a provision contrary to the principles of Washington law.

Moreover, the District offers no convincing response to the fact that the contract terms regarding undergrounding are contrary to Washington law. The District offers no response whatsoever to the legal principle that CenturyLink's tariffs, once approved by the WUTC, have the force of state law. *E.g., Gen. Tel. Co. of the N.W. v. City of Bothell*, 105 Wn.2d 579, 716 P.2d 879 (1986). The District's only substantive response, again, is that it is not subject to WUTC jurisdiction, which again proves nothing. There is nothing unusual about CenturyLink enforcing its tariffs against customers or other third parties in the courts of Washington. *Id.* Moreover, the District, again, makes no response to the fact that its

proposed contract is completely contrary to statutory law, specifically RCW 35.99.060.

3. An Agreement Is Not Fair, Just and Reasonable if Its Intended Meaning Cannot Be Derived from Its Terms

Notably, the District makes no attempt to defend the actual text of the Agreement on the question of whether it is intended to charge on a per pole or per contact basis. *Compare* Op. Br. at 43-44 *with* PUD Br. at 52-53. Rather, the District contends that any ambiguity can be resolved by referencing the party's correspondence and communications, PUD Br. at 54-55, notwithstanding the District's insistence on an integration clause in the Agreement, Ex. 38 at COM 00143. The District's reliance on *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), does not negate our courts' continued insistence that the parties may not rely on such extra-contractual documents in the face of an integrated agreement. The parol evidence rule continues to preclude the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement. *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009) (en banc).

The District implicitly admits that the agreement is unworkably ambiguous on the question of grandfathering. The District makes no

attempt to actually analyze the contract provisions at issue. *Cf.* Op. Br. at 44. Instead, the District quotes trial testimony of the District’s general manager, PUD Br. at 48, without addressing, at all, those provisions where he acknowledged the ambiguity of the document. RP 257:13:-18.¹³

Finally, the District again sidesteps the concerns generated by the ambiguous agreement, this time on the issue of the actual fees to be charged. PUD Br. at 53. The concern is not the rates identified in the agreement, as the PUD discusses in its brief. *Id.* Rather, the concern is that there are other fees that – as PUD managers admitted, RP 859:25-863:21 – are *not* specified in the agreement. It is not reasonable to ask a party to sign an agreement that amounts to a blank check.

4. An Agreement Is Not Fair, Just and Reasonable if Its Terms Are Overreaching

CenturyLink pointed out to this Court that the District’s proposed agreement would have the effect of immunizing it against its own negligence. Op. Br. at 45. Notably, the District does not deny this result. PUD Br. at 48. Rather, the PUD again points to isolated provisions in other contracts. *Id.* For all the reasons identified above, *see* pp. 16-17, it is particularly inapt to cherry pick this type of allocation of economic risk

¹³ “Q. So my question for you was, how am I to know looking at [Agreement Section] 6.1 that I’m not required to change existing attachments if the district’s engineering standards change? There’s no way to know that, is there? A. No, there is no way.”

from the agreements negotiated in good faith by other parties.

Equally inapt is the PUD's defense of its attempt in the agreement to regulate CenturyLink's activities in the right of way *away from the pole*. The District instead asserts that the Statute, which by its terms regulates attachments to PUD poles, also authorizes the District to regulate CenturyLink's right¹⁴ to use facilities in the right of way *not* attached to the District's poles. *Id.* at 51. The PUD can point to nothing in the text of the statute, nor its legislative history, that purports to regulate CenturyLink's activities away from the poles owned by the PUD.

Finally, the PUD offers no defense to the overreaching inherent in the one-for-one "reciprocity" it demanded in the proposed agreement. Again, it is undisputed that CenturyLink occupies only one foot of space on PUD owned poles, but the PUD occupies seven-and-a-half feet on CenturyLink poles. *Op. Br.* at 46. It is the District's response that such an operation could be handled through billing. *PUD Br.* at 53 n.60. Of course, such a billing treatment does nothing to offset the shocking disparity insisted upon by the District, where it derives 750% more benefit from the "reciprocal" agreement it insisted upon.

¹⁴ The District plainly misconstrues Article XII, Section 19 of the Constitution. By its terms it expressly grants telephone companies the right "to construct and maintain lines of telegraph and telephone within this state." That right includes along all public rights of way. RCW 80.36.040.

For all of the foregoing reasons, the terms and conditions of the agreement demanded by the PUD were neither fair nor reasonable.

E. Damages, Attorneys' Fees and Litigation Expenses Awarded to the District

CenturyLink continues to join in all arguments made by co-defendants Comcast and Charter on the issues of damages and the awards to the District of attorneys' fees and costs. The District can hardly complain, given that it insisted on joint and several liability against all defendants. Judgment, CP 2324-27.

F. CenturyLink Is Entitled to Its Attorneys' Fees in This Action

In Washington, attorneys' fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785, 197 P.3d 710 (2008). However, the District claims that RCW 4.84.330 does not control because in the District's view the agreement was entered into prior to 1977. PUD Br. at 69. The District is again in error.

The District fails to recognize that RCW 4.84.330 applies to "any action" on a contract, even when the claimed contract is found to have never been formed. *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984) (RCW 4.84.330 applied even though no contract existed due to a lack of the meeting of the minds). The court there held that "the broad language '[i]n any action on a contract'

found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract.” 39 Wn. App. at 197.

Under *Herzog* CenturyLink is patently entitled to recover its attorneys’ fees under RCW 4.84.330. The District admits that it filed suit against CenturyLink relating to the District’s new Pole Attachment Agreement. *See, e.g.*, PUD Br. at 9-10. The trial court thus entered specific findings of fact – proposed by the District, and not appealed – that this action related to this proposed contract. In Finding of Fact and Conclusion of Law #46, the trial court concluded that “Defendants ... must enter into the District’s proposed Pole Attachment Agreement.” CP 2307. Similarly, in Finding of Fact and Conclusion of Law #7 regarding Plaintiff’s motion for award of attorneys’ fees and litigation expenses, the trial court found that “Defendants’ failure to execute the District’s new Pole Attachment Agreement was improper, and Defendants’ [*sic*] are, therefore, estopped to deny the validity of Section 16.6 of that Agreement providing for the recovery of attorneys’ fees.” CP 2316. These findings and conclusions clearly establish that Plaintiff’s action fundamentally was an action “on a contract” under RCW 4.84.330 that the District demanded that CenturyLink sign. CenturyLink is thereby entitled to recover its attorneys’ fees and costs.

Moreover, even if the District’s lawsuit did not concern the

proposed Pole Attachment Agreement (which it plainly did), CenturyLink is nevertheless entitled to recover its attorneys' fees and costs under RCW 4.84.330. The focus on CenturyLink's entrance into an agreement with the District in 1969 is misplaced. The 1969 contract was terminable at will after its first year, on six months' written notice. Ex. 3 at 7. Under Washington law, "[a] party to a terminable at will contract can unilaterally modify the contract because in doing so, *the party is simply terminating the old contract and offering a new one.*" *Associated Petroleum Prods., Inc. v. Nw. Cascade, Inc.*, 149 Wn. App. 429, 434, 203 P.3d 1077 (2009) (emphasis added). Thus, with a terminable at-will contract, "*a new contract is formed* when [the other party] communicates the new terms" *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 769, 145 P.3d 1253 (2006) (emphasis added). The 1969 agreement was modified in 1987 when the parties agreed to a new rate. Ex. 3 at 8; PUD Br. at 7. Therefore, in 1987 a new contract was formed and the contract under which CenturyLink seeks its attorneys' fees under RCW 4.84.330 was entered into well after 1977.

Finally, on equitable grounds CenturyLink is entitled to fees, even if the parties' contract was entered into before 1977. In *Yuan v. Chow*, 96 Wn. App. 909, 918, 982 P.2d 647 (1999), the equitable principle behind court decisions and legislative enactments was identified when the court

noted that “the purpose of the bilateral fee provision of RCW 4.84.330 is to provide mutuality of remedy” Additionally, numerous other courts in Washington have applied the equitable principle of mutuality of remedies to support an award of attorneys’ fees when no statute provided for their recovery. *See, e.g., Kaintz*, 147 Wn. App. at 788-89; *Mt. Hood Bev. Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 63 P.3d 779 (2003) (mutuality of remedies principle upholds award of attorney fees, even though the statute authorizing fees held invalid). Accordingly, under the equitable principle of mutuality of remedies, CenturyLink is entitled to recover its attorneys’ fees and costs. Pursuant to RAP 18.1, CenturyLink requests that it be awarded its attorneys’ fees and costs, in this Court and below.

III. CONCLUSION

The trial court’s decision in this case is plainly erroneous. For the numerous reasons identified above, its interpretation and application of the Statute were wrong, and its actions in this case must be reversed.

RESPECTFULLY SUBMITTED this 19th day of February, 2013.

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By



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Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that I caused a true and correct copy of the foregoing ***Reply Brief of Appellant CenturyLink of Washington, Inc.*** to be served on the following individuals:

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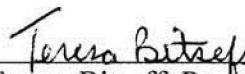
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APPENDIX A

RCW 80.54.040 and RCW 54.04.045(3)(a)

RCW 80.54.040	RCW 54.04.045(3)(a)
<p>A just and reasonable rate</p> <p>shall assure the utility the recovery of not less than all</p> <p>the additional costs of procuring and maintaining pole attachments,</p> <p>nor more than</p> <p>the actual capital and operating expenses, [REDACTED], of the</p> <p>utility</p> <p>attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities, and uses which remain available to the owner or owners of the subject facilities.</p>	<p>A just and reasonable rate</p> <p>must be calculated as follows:</p> <p>(a) One component of the rate shall consist of</p> <p>the additional costs of procuring and maintaining pole attachments,</p> <p>but may not exceed</p> <p>the actual capital and operating expenses</p> <p>of the</p> <p>locally regulated utility</p> <p>attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities;</p>
1979 c 33 § 4	2008 c 197 § 2; 1996 c 32 § 5